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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RUSSELL VINCENT,
Petitioner,

vs.

THE STATE OF MISSOURI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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QUESTIONS PRESENTED

1. Is a criminal defendant who raises a constitutional claim under *Batson v. Kentucky*, 106 S.Ct. 1912, entitled to a fact-finding hearing prior to trial to determine if there has been purposeful discrimination when the prosecution has applied every peremptory strike to remove blacks from the venire?

2. Did the Missouri Court of Appeals err in construing *Batson v. Kentucky*, 106 S.Ct. 1912 as imposing a burden on Respondent to show tokenism or prejudice?

PARTIES IN THE COURT BELOW

The Petitioner, Russell Vincent was convicted of Illegal Possession of Schedule II Controlled substance, Cocaine, in violation of Section 195.020, RSMo. He was tried in the Circuit Court of the City of St. Louis.

The State of Missouri is the Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

The Petitioner, Russell Vincent, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Missouri entered in this proceeding on September 13, 1988.

CITATIONS TO OPINIONS BELOW

The Missouri Supreme Court issued no opinion in this cause having considered the Petitioner's Application for Transfer from the Eastern District Court of Appeals of the State of Missouri and having denied same. The memorandum denying the application for transfer has not been published as of this date. The memorandum decision and the mandate of the Supreme Court is set out in the appendix at p. A-33.

The opinion of the Missouri Court of Appeals, Eastern District, is reported at 755 S.W.2d 400, and is set out in the appendix at pp. 25-30. This cause carried case number 52885 in the Missouri Court of Appeals.

The decision of the Circuit Court of the City of St. Louis, where this cause carried number 851-01725, wherein Petitioner's objection to the exercise of the prosecutions right of six peremptory challenges against blacks was denied, is set out in the appendix at pp. 20-22.

JURISDICTION

The judgment of the Supreme Court of Missouri denying Petitioner's application for transfer of the case from the Missouri Court of Appeals, Eastern District, was entered on September 13, 1988. (Appendix A-33). This petition for certiorari is filed within 60 days of that date. Review is sought pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED

This case involves a constitutional claim of denial of equal protection under the equal protection clause of the Fourteenth Amendment of the Constitution which is set out at page A-1.

Other statutes involved are Missouri Revised Statute 546.180 which is set out at page A-2, and R.S. Mo. 195.020 under which the Petitioner was charged and convicted, set out at page A-1.

STATEMENT OF THE CASE

The Petitioner, Russell Vincent, a black man, was charged with illegal possession of Schedule II controlled substance-Cocaine, and with being a persistent felon offender. Petitioner was found guilty by a jury and the trial court sentenced him as a persistent offender to fifteen years imprisonment. The State's evidence consisted of the testimony of two St. Louis Police Officers and a criminalist. The testimony adduced at trial involved the observation by the Police officers of the Petitioner receiving money for a tinfoil packet, and shortly thereafter, exchanging money for two tinfoil packets which he placed in his pocket. Petitioner was then arrested and the evidence at trial was that the white powdery substance in the tinfoil packet was cocaine. Petitioner did not testify at trial. At the close of the State's case and again at the close of all the evidence, Petitioner made a motion for directed judgment of acquittal which was denied.

This case involves Petitioner's objection to the prosecutor's systematic use of all six peremptory challenges to exclude blacks from the jury which was timely made by his counsel upon the conclusion of Voire Dire and prior to the commencement of the case in chief. (Appendix, A-10).

Petitioner appealed his conviction to the Missouri Court of Appeals, Eastern District where he alleged two assignments of error: First, that the trial court erred in refusing to grant his motion for mistrial on the ground that the State had exercised all of its peremptory challenges systematically to exclude blacks from the jury, thus depriving Petitioner of a fair and impartial jury guaranteed by the Fourteenth Amendment to the United States Constitution. Petitioner's second writ of error involving insufficient evidence is not before this Court.

Petitioner's application for transfer of his appeal to the Missouri Supreme Court was denied without opinion, thus occasioning this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS QUESTIONS CONCERNING THE FACT FINDING HEARING TO WHICH PETITIONER IS ENTITLED WHEN HE RAISES THE ISSUE OF DENIAL OF EQUAL PROTECTION AS ENUNCIATED IN *BATSON V. KENTUCKY*, 106 S.CT. 1912 BY THE EXCLUSION OF MEMBERS OF HIS OWN RACE FROM THE VENIRE BY THE PROSECUTIONS' USE OF PREEMPTORY CHALLENGES.

This case raises significant questions concerning the fact finding which a trial judge should conduct to determine whether the prosecution has purposefully discriminated by the exercise of peremptory strikes at the onset of trial. It raises questions involving the role imposed upon the trial judge when a claim of prejudice has been raised under *Batson v. Kentucky*, 106 S.Ct. 1912, and a prima facie case of discriminatory exclusion has been made and is in issue before the trial court.

In *Batson*, this Court modified the traditional rule of the peremptory challenge for constitutional reasons, id., page 1723. See *Swain v. Alabama*, 380 U.S. 202 The Court has generally recognized that it is violative of the Equal Protection Clause of the Fourteenth Amendment of the Constitution when the prosecution exercises peremptory challenges to exclude from the jury persons who belong to the same race as the defendant to further racial discrimination. In *Batson*, the Court for the first time explicitly subjected the peremptory challenge to the strictures of the Equal Protection Clause.

In the case below, every black juror which the prosecution could exclude, including the alternate juror, was removed with the exercise of seven peremptory strikes. (Appendix, A-10-22) R.S. MO. 195.020.

After Petitioner raised his *Batson* claim in the form of an objection (Appendix, A-10), defense counsel inquired of the pro-

secutor of the reasons why all peremptory strikes were used against blacks. (Appendix, A-10-22). Petitioner made out a prima facie case of purposeful discrimination in that he had shown that he was a member of cognizable racial group and that the prosecution had exercised peremptory challenges to remove members of his race from the panel. Petitioner was entitled to rely upon the fact that peremptory challenges in his case constituted a practice that permitted discrimination by those who were of a mind to discriminate. Finally, inasmuch as all peremptory challenges were used by the prosecution to strike blacks, Petitioner properly raised the inference of discrimination since the result was the uniform exclusion of blacks. *Batson*, Supra.

Under *Batson*, supra, the burden shifted to the prosecution to come forward with a clear and reasonably specific neutral explanation of legitimate reasons, related to the case being tried, for the striking of each juror. Each reason proffered was subjective or intangible. None of the reasons offered were legitimate trial-related reasons for striking only black jurors. (Appendix, A-10-22).

Upon providing these reasons for exclusion, the trial court conducted no further inquiry of the prosecutor. (Appendix, A-20-22). The record is devoid of any inquiry by the trial court which would provide fact finding minimally necessary to exclude the possibility of purposeful discrimination by the prosecutor under the circumstances. *Batson*, p. 1723. The trial court applied a standard which it understood to be "absent a glaring pronouncement of something that is absolutely unconscionable, I think that must be reposed in the discretion of the trial counsel, because so much depends upon the selection of a jury. As a matter of fact, *it is the most important facet of the trial as we know it*." (Appendix, A-21),(emphasis added). Petitioner claims that the failure of the trial court to conduct an inquiry let stand his prima facie showing of racial discrimination violative of the Fourteenth Amendment, because the absence of

affirmative inquiry by the trial court did not adequately protect him from the use of race-based peremptory challenges.

Petitioner claims that the trial court was required to conduct an affirmative inquiry to satisfy his constitutional claim to equal protection under the Fourteenth Amendment. *Batson*, supra. Since the Court in *Batson* did not then formulate the procedures and provide guidance as to the degree of affirmative scrutiny to be exercised by the trial court, the Supreme Court now has the opportunity to do so. Petitioner urges that he was entitled to an affirmative inquiry and fact finding by the trial court to assure him protection of his constitutional claim prior to trial.

Petitioner further claims that a hearing mandating the affirmative inquiries of the trial court is necessary to avoid the invidious discrimination which is permissable with the use of statutory peremptory strikes. See *R.S.* Mo 546.180. In the alternative, the Court may wish to examine the guidelines adopted in *People v. Wheeler*, 583 P.2d 762 to extend representative cross-section requirements to the petit jury selection process, or the doctrine adopted in *Commonwealth v. Soares*, 387 N.E.2d. at p. 516., wherein a balance is sought to be obtained between diffused impartiality in petit juries and the legitimate use of peremptory challenges.

Petitioner urges that mandatory affirmative fact finding by the trial court would remove the possibility that the trial court indulged in the same subjective analysis provided by the prosecution, the effect of which would be to deny him equal protection of the law. Petitioner urges that the trial court below indulged in such a subjective analysis when it failed to conduct affirmative fact finding in light of unanimous application by the prosecution of all peremptory strikes to eliminate blacks. See *U.S. v. Gordon*, 817 F.2d 1538, 1541, *U.S. v. Battle*, 836 F.2d 1084.

In sum, Petitioner urges that the Court impose a rational, mandatory fact finding procedure devoid of subjective analysis

to be exercised by the trial court when a *Batson* claim is made which will disallow the use of peremptory strikes to further invidious racial discrimination.

II. THIS CASE PRESENTS QUESTIONS CONCERNING WHETHER IT REMAINS NECESSARY AFTER *BATSON V. KENTUCKY*, 106 S.CT. 1912, TO SHOW TOKENISM OR PREJUDICE IN ORDER TO RAISE A *BATSON* CHALLENGE.

The Decision of the Missouri Court of Appeals in in direct conflict with the ruling of the Eighth Circuit of Appeals in *U.S. v. Battle,* 836 F.2d 1084.

The decision of the Missouri Court of Appeals, Appendix, A-25 to A-30, analyzes *Batson* and finds that as it applies to the facts of this case, Petitioner has no standing to raise a *Batson* claim because "Defendant makes no showing of specific prejudice to him arising from the jury by which he was tried" (Appendix, A-28).

The court emphasized that the jury as finally constituted in Petitioner's case consisted of seven whites and five blacks. (Appendix, A-26). The court then stated that in *State v. Crump*, 747 S.W.2d 193, it confronted a similar situation and an equally constituted jury. The court heid there that defendant failed to make a prima facie case under *Batson* because the eventual composition of the jury prevented the defendant from complaining that he was denied equal protection of the law.

Petitioner argues that this is not the proper interpretation or application of *Batson*. *Batson* does not require as a prerequisite to its application an analysis of the eventual composition of the jury. Nor does *Batson* require a showing of tokenism. The decision of the Missouri Court of Appeals is erroneous because it deprived Petitioner the guarantee of his equal protection rights prior to the commencement of trial. It is of no consequence, according to *Batson*, that the eventual composition of

the jury consisted of whites and blacks. The issue is not eventual composition of the jury, but rather the exercise of the prosecution's peremptory strikes to exclude members of the defendants' race to further racial discrimination.

Thus, the retroactive analysis of eventual composition of the jury must fail in that maintained a burden upon the Petitioner which survived his prima facie showing of a *Batson* claim.

Petitioner asserts that it was not the intention of this Court to permit a residuary burden to be placed upon Petitioner to show prejudice or tokenism because in this respect the equal protection right offorded him would not then dampen the exercise of invidious discrimination by the prosecution. To construe *Batson* as further imposing a burden of proof of discrimination or tokenism would merely give lip service to the constitutional right *Batson* intends to protect.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment of the Missouri Supreme Court.

Respectfully submitted,

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APPENDIX

APPENDIX A

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

195.020. Prohibited Acts.

1. It is unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, distribute, or compound any controlled or counterfeit substance except as authorized in sections 195.010 to 195.320.

2. It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce. process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance or an imitation controlled substance in violation of this chapter.

3. It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance or an imitation controlled substance in violation of this chapter.

4. It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia.

5. It is unlawful for any person to use, or to possess with intent to use, an imitation controlled substance in violation of this chapter.

6. It is unlawful for any person to deliver, possess with intent to deliver, manufacture with intent to deliver, or cause to be delivered any imitation controlled substance.

7. It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication, or to post or distribute in any pulic place, any advertisement or solicitation with reasonable knowledge that the purpose of the advertisement or solicitation is to promote the distribution of imitation controlled substances.

546.180. Peremptory challenge, number allowed

1. In all criminal cases the state and the defendant shall be entitled to a peremptory challenge of jurors as follows:

(1) If the offense charged is punishable by death, the state shall have the right to challenge nine and the defendant nine;

(2) In all other cases punishable by imprisonment in the penitentiary, the state shall have the right to challenge six and the defendant six;

(3) In all other cases not punishable by death or imprisonment in the penitentiary, the state and the defendant shall each have the right to challenge two.

2. When several defendants are tried together, the following provisions shall apply:

(1) Each defendant then on trial shall be allowed separate peremptory challenges as provided in subsection 1;

(2) The number of peremptory challenges allowed the state by subsection 1 of this section shall be multiplied by the number of defendants then on trial in each case.

3. In all criminal cases, a list of the jurors found by the court to be qualified to sit in the case shall be forthwith delivered by the clerk of the court to the attorney for the state who shall thereupon and within such time as may be directed by the court, announce or indicate the challenges for the state. The jury list, with the state's challenges indicated thereon, shall then be forthwith delivered to the defendant or his attorney, who shall thereupon announce or indicate his challenges and return the list into court within such time as may be ordered by the court, and the remaining twelve, or if there be more than twelve, the first twelve next remaining on the list unchallenged, shall be the jury to try the case.

APPENDIX B

IN THE CIRCUIT COURT OF MISSOURI
22ND JUDICIAL CIRCUIT, DIVISION 12
Honorable Michael F. Godfrey, Judge

No. 851-01725

State of Missouri,
Plaintiff,

vs.

Russell Vincent,
Defendant.

TRANSCRIPT OF PROCEEDINGS

(Filed Aug. 5, 1987)

On Tuesday, the 20th day of January, 1987, the above-entitled cause came on regularly for hearing before the Honorable Michael F. Godfrey, Judge of Division 12 of the 22nd Judicial Circuit.

APPEARANCES

For the Plaintiff:

Ms. Kathy Priebe
Assistant Circuit Attorney
City of St. Louis
State of Missouri

For the Defendant:

Mr. Walter L. Brady
1221 Locust Street
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Carolyn P. Hill
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Circuit Court of Missouri, 22nd Judicial Circuit

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TRANSCRIPT OF PROCEEDINGS - January 20, 1987

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[116] JUROR MC COURT: That's the only thing I wanted to know.

MR. BRADY: Mr. Simmons, you have a number of things that have happened in your life that could **[117]** have some effect on you. On further reflection, can you think of any reason that any of those experiences that you have told us about would tend to make you lean one way or another? Is there anything that has been said that would push you in a decision one way or the other in this trial or in any criminal trial?

JUROR SIMMONS: No, other than what I told the lady.

MR. BRADY: That has no bearing on this case.

That is the complete thrust of the questions that are put to you. This man, whose name is Russell Vincent, has been charged, and to that he has pled not guilty. Therefore, a question of fact has arisen that has to be resolved by a jury. Now, in further looking into that, is it still your position that on this case, you would not borrow from any experiences or anything like that but give this defendant and the State of Missouri a fair hearing?

JUROR SIMMONS: Absolutely. No question.

MR. BRADY: Thank you.

Your honor, I have no further questions on Voir Dire.

THE COURT: Very well.

Ladies and gentlemen of the jury panel, **[118]** that concludes the Voir Dire examination.

Voir Dire means literally to speak the truth. It is a French word. It has to do with the selection of the jury.

Now, you have been sitting there for right at an hour.

It now becomes the duty of the attorneys to make the selection of the twelve of you and one alternate that will be the jury to hear this case.

Now, twenty-seven of you have been impanelled or questioned, so to speak. The State must strike six names from the list and the defendant must strike six names from the list. Then we have three alternates, and the State must strike one of the names from the three alternates and the defendant must strike one name. The person remaining will be the thirteenth juror.

This process may take some time, ten minutes or so.

I see no reason for you to be sitting there in those hard chairs while this actual selection of jurors goes on between the attorneys. So we are going to recess now for a short period of time to give the attorneys the opportunity to make the final selection of the thirteen who will be the jury to try **[119]** this case.

Now, we are going to recess, and at each and every recess of the Court, as well as at all adjournments, I am compelled under Missouri Supreme Court Rules and Procedures to give you this admonition, which you are to carry with you throughout the trial of this case. I am again going to remind you of what you were told at the first recess of the Court, and that is until you retire to consider your verdict, you must not discuss this case among yourselves or with others or permit anyone to discuss it in your hearing.

Your are not to form or express any opinion about the case until it is finally given to you to decide.

Now, bearing that admonition in mind, we will be in short afternoon recess.

It is also very important, ladies and gentlemen, that one, please do not leave the seventh floor of this building during this recess, do not leave this floor. Two, please be as quiet as you can, because there are trials going on in other divisions. We have three other trial divisions on this floor, and it is extremely annoying and disturbing to have people out in the halls talking when sworn jurors are trying **[120]** to hear sworn testimony in

the actual trial of a case. So please do not leave this floor, the seventh floor, and please be as quiet as you can.

We will be in short afternoon recess.

(Whereupon Court was held in temporary recess.)

* * * * * *

APPENDIX C

TRIAL

[2] The trial began on Tuesday, January 20, 1987, before the Honorable Michael F. Godfrey, Judge of Division 12, in the Circuit of the City of St. Louis, State of Missouri, at 9:30 a.m., and a jury and one alternate juror, which were impaneled, selected, and sworn.

Ms. Kathy Priebe, Assistant Circuit Attorney, appeared for the State of Missouri.

The Defendant, Russell Vincent, was present in person and was represented by his attorney, Mr. Walter L. Brady.

Tuesday, January 20, 1987

(Whereupon the following proceedings were had in Chambers after the selection of the jury.)

[3]THE COURT: Let the record show that these proceedings are being held in the Court's Chambers, the Judge's Chambers, and that this occasion that we are going to discuss has just arisen since the Voir Dire has been concluded.

Make whatever record you so desire, Counsel.

MR. BRADY: Your Honor, I make an objection to the fact that the Assistant Circuit Attorney has exercised her right of six preemptory challenges on this panel. All six of the stricks appear to be on the basis of race.

On Page 1, Juror Number 487, Mattie Starks, a black woman who has lived on Newberry Terrace in the City for a number of years.

Number 220, Rosie Fountain, another black lady. I don't know how long she has been at that address, but she has been a presser at the same job for fifteen years.

Going back to Juror 487, I believe she has lived in the residence on Newberry for thirty-seven years.

Then back to Rosie Fountain, a black lady. She apparently has had a job as a presser at Staten [4] Island Cleaners, I believe she said, for about fifteen years. She has not been the victim of a crime.

Mrs. Starks said she has been a victim of burglary.

The next one stricken is a black man who lives on Rowan Street. He is unemployed. He has never had any trouble with the law.

On Page 2, the State has removed Juror Number 407, a black man. His name is Sylvester Nibblett. Sylvester has been a clerk for the United States Postal Service, no trouble with the law.

The only thing I have in my notes also on this page is Juror Number 506, Helena Tyler. She has been living at the same address on St. Louis Avenue for eight years. She is a clerk at the Mercantile Bank in the city.

On Page 4 of the jury list, Juror Number 486, Durinda Starks has lived on Shawmut Place in the city for one year. She has been a victim of car thefts and burglary. She was removed by the State.

On Page 5, one of the alternates — there were two white people and one black — the State has seen fit to remove the only black among the three alternates, that being Foster Hayward, Juror Number [5] 268. He owns his own home in the city, has lived there sixteen years.

My objection is based on the fact of the systematic elimination of as many black persons as is humanly possible from this list, from the top to the bottom, and I don't see anything in here that would indicate any problem.

Now, I would like to ask the Assistant Circuit Attorney to state for the record the reasons why you have stricken these people.

Directing your attention to the first one you have stricken, Mattie L. Starks. Her son was a victim of a burglary. What was your reason for removing Ms. Starks?

MS. PRIEBE: Your Honor, I would first like to note for the record that in the stricking of these individuals, I did not leave us with an all-white jury.

However, I do believe, in fact, some were being stricken for no reason. I would like to point out that perhaps more so than in any trial in which I have selected a jury, I found it very difficult to find people on the panel to strike. I would say for at least half of my strikes, I was eliminating people that I would have just as soon have had on this jury.

[6]Some of the people I had reasons for striking . There were several people that were stricken based on something that I would not have stricken on if I had had someone else there to eliminate.

What I am saying is I agree, some of these people who were stricken would be good jurors, and I wouldn't have any problem with them. However, I felt that it was a very good panel and I found it very difficult to find anything to dislike about most of those people.

Directing your attention to the third juror, Mattie Starks, I believe she would be one of those in the category I just mentioned, which is that I would not have any problem with her as a juror. The reason I did not select her, as I just described, was because her grandson was convicted of a burglary. She did not express any indignation or anger toward the State over that, but nevertheless, I felt that that might have some inf. ence upon her. Again, because of the fact that I did not have people with real grievous flaws to strike, I struck her for that reason.

MR. BRADY: Can we agree that her occupation is that of a supervisor and apparently designated as Section Chief of the United States **[7]** Record Center in this City?

MS. PRIEBE: I believe all these matters on what she said she did. I have no problem to agreeing that she is employed as a Section Chief at the Record Center.

MR. BRADY: And that all the people are black?

MS. PRIEBE: I am not contesting that.

MR. BRADY: I direct your attention to Juror 220.

MS. PRIEBE: Rosie Fountain. The basic reason that I struck this person, who is also an acceptable juror, is that I did not get any answers from her, other than when I asked her a direct question. I find it awfully difficult and almost impossible to believe that someone has lived in the area for sixteen years and never suffered as a victim of crime. I felt that she did not really want to talk or open up, and again, I do state she would have been an acceptable juror if there has been anyone else I wanted to strike.

MR. BRADY: Are you finished on Fountain now?

MS. PRIEBE: I am.

MR. BRADY: On the subject of **[8]** Rosie Fountain, if I understand you correctly, you said that she lived in the area for fifteen or sixteen years or something, and you found it difficult, if not impossible, to believe she had not been a victim of crime, as she has stated?

MS. PRIEBE: I am saying that I received nonanswers. In other words, when she could avoid giving an answer, I did not get an answer. She did not volunteer any answers when the group was questioned, and she did not answer other than to say no to the questions as to whether or not she had been a victim of a crime, whether she ever had been or she knew of anyone close to her who had ever been in any trouble. That is quite possible, but given the fact that I was at a loss at some point as to who to strike and the fact that I felt that she was possibly less willing to

speak to me than many of the other jurors had been, she was stricken.

MR. BRADY: Her blackness, you say, has nothing to do with it, her race has nothing to do with it?

MS. PRIEBE: Our office has a consistent policy, which is expressed in writing by Mr. Peach and directed to the Circuit Attorneys, that we are not to make strikes for racial reasons. To my knowledge, **[9]** that is not done, and I certainly do not do it

MR. BRADY: Let's address ourselves to the next one.

On the first page, Juror 227, Charles G. Franklin is a black male who lives in the fourteen hundred block of Rowan Street. I am not certain where that is.

The record indicates that he is unemployed, and his response when asked if he or his close friends or members of his family have had trouble with the law was no.

I am not aware that being temporarily out of work is a reason for striking a juror.

What is the reason for removing that black man as opposed to any white on the jury?

MS. PRIEBE: First of all, I believe we came rather close to striking Mr. Franklin for cause. He said he believed he might be friends with some of the members of the defendant's family. Upon further examination, he was not sure whether these people were connected with the defendant.

At first, he said that he might feel uncomfortable sitting on the case because of those friendships. He was then rehabilitated and remained on the panel.

[10] However, I think there was too much wavering on his part as to whether or not he thought he knew some of the defendant's family.

Second, again, as the others, he gave no answers to any questions other than whether or not he was a victim and so on.

Basically, it was just the fact that I felt that he had some doubt in his mind as to whether he knew the defendant or not — I'm sorry — the defendant's family.

And when I am looking for persons to strike, the main reason to strike, I do consider that a concern, being unemployed. That may weigh in my decision. However, when I questioned him further, he said his family was in the construction business, and I realize quite a few people who are in the construction business are not employed year round, and specifically not in the wintertime.

I don't think that weighed overly heavy in my determination whether or not to strike him. It was a matter whether he knew the defendant's family and felt comfortable as a juror.

MR. BRADY: Is it correct that he raised the question as to whether or not he might know the defendant in this case because the name sounds [11] familiar to him? We developed out of the hearing of the jury that there was a disparity of approximately eighteen years in age between this defendant and this potential juror. Mr. Franklin then indicated that indeed, that was not the one he knew. He merely raised the question of a similarity in a spirit of candor.

I would imagine —

MS. PRIEBE: I would like to respond to that first.

First of all, the things that you mentioned as being out of the hearing of the jury, they were brought up in front of the jury. Defendant's counsel raised the issue of defendant's age and whether or not they would be likely to even know each other given their difference in ages.

The prospective juror's first remarks, however, were not whether he knew the defendant, but whether he knew the defen-

dant's family members. Obviously, the defendant could well have family members in the age group with Mr. Franklin.

I didn't feel — although the witness was rehabilitated , I did not feel like I could be certain that he did not have any friendships that might influence him in that regard.

[12] MR. BRADY: The next person to be struck is on Page 2, Juror 407, Sylvester Nibblett, a black male, who is a clerk for the United States Postal Service. He lived on Floy Avenue. He indicated that he rented his home there and that he has had no trouble with the law, that he has not been a victim of crime.

Would you state your reason for removing this black male as opposed to another person who might be of the white race?

MS. PRIEBE: That was a person who during the time that I was questioning him, he seemed very reluctant to talk to me or to look at me. Again, he did not give any what I would call options. He did not optionally expand on anything or offer anything additional even when I encouraged him to.

Again, I did not feel this person would be really a poor juror, but rather that this was a very good juror panel, and therefore, because of just sort of a feeling I got when I questioned him, I felt he was not looking at me and did not want to speak to me. I didn't feel like I was impressing that juror very well. When that happens, when I feel that I may not develop a rapport with him over the time of the trial, then I would eliminate him on that basis.

[13]MR. BRADY: Was there any question placed by you to the juror, to your knowledge, upon his qualifications to sit fairly on this case that was not answered?

MS. PRIEBE: As I said, no. He answered the questions, but he did not provide any additional information, and through his nonverbal actions he seemed to want to avoid me and not to like me.

MR. BRADY: Very well.

The next juror who was stricken is also on Page 2 of the venireman's list, a black female, Juror Number 506, Helena R. Tyler, who has lived in the twenty-three hundred block of St. Louis Avenue, I believe she indicated, for eight years. She has been a clerk for the past seven years for Mercantile Bank in the City of St. Louis.

My notes show that she stated that neither she nor any members of her family have had any trouble with the law and that she has not been a victim of crime.

Would you indicate your reason for removing that lady as opposed to any person of the white race?

MS. PRIEBE: Are we speaking of Ms. Tyler?

MR. BRADY: Yes.

[14]MS. PRIEBE: In this case, this was another one of the jurors that I was not particularly anxious to strike. Eventually, I believe my decision was based upon her clothing than anything else. Again, it was sort of an intangible. I felt that perhaps it was the way she dressed. She dressed very flashily to come to Court, and that may indicate that she would not be serious about the proceedings at hand.

Again, it was a subjective matter, but I made a note, and I do that when I feel the people will make good jurors or will not make good jurors, and that was something I had noticed immediately, her clothing.

MR. BRADY: Did she make any statements to you in response to a question or voluntarily make any statements to you that would lead you to believe that she would not take this case seriously as you indicated?

MS. PRIEBE: No, and I didn't question her about that.

However, while I recognize I am not able to, nor do I want to mainly strike based upon race, other factors enter in that are intangible, such as clothing, manner, speaking, the way a person responds, **[15]** looks, or does not look at you, and it is perfectly within my justification as a Prosecutor to say that this person is not going to be inclined toward the State.

MR. BRADY: I believe the next juror who was stricken appears on Page 4, Juror 486 Durinda Starks. She has lived for one year in the same residence in the fourteen hundred block of Shawmut Place. She has been a clerk typist for the United States Government, I believe she said, for a period of three years.

This lady testified that she had been a victim of a car theft and a burglary.

Would you state your reasons for striking her name from the list of veniremen?

MS. PRIEBE: This again is one that I feel was a fairly subjective decision. I again made notes about the woman's clothing when she came in. Again, I believe this was subjective both as to her appearance and as to her manner of responding to me. When I spoke to her, I didn't feel like I was communicating very well with her.

Also, if I could jump back for a second, I felt I had sonehow antagonized this lady, Juror 486, with my questions.

[16] That also brings me back to a lady we spoke of earlier, a lady on Page 1, the lady with the grandson who had been convicted of a crime. That's Ms. Starks, Juror 487. I also felt that I had somehow antagonized her by dragging these details out of her, and I don't feel like I had successfully recovered my rapport with her by the time I sat back down.

I sort of felt like I had turned these two people them off in some way and that I didn't get them back before the end of Voir Dire.

MR. BRADY: The final strike on the alternate, I believe, on Page 5, Venireman 268, Foster Hayward, who is a black male living in the fifty-nine hundred block of Shulte. He owns his own home, and has been there for sixteen years. He has been employed by General Motors Corporation, apparently the auto division in this city, for some eighteen years. He has been a victim of a crime. He has had several lawn mowers stolen, he indicated, and they weren't recovered. That's the extent of my notes on this gentleman.

Would you state what your reasons are for removing him from the list of three possible alternates, of whom the others there were a white male and a white female?

[17] MS. PRIEBE: In this case, this is a small example of the problem with this entire list, the fact that all three of them would have been good alternates. I particularly liked Juror 13.

I really felt torn between the jurors, which one to eliminate, Juror 256 or Juror 268, and I just sort of used a basic feeling I had who I felt was communicating with me best. This gentleman did give me longer answers. However I guess I tend, when I see someone come to Court and they merely dressed in a sweater and they are not very dressed up, I look more upon the person who is a little more dressed for business. Therefore, I sort of split it. I guess that is a clothing-type decision too, appearance, very subjective there, but I do not believe it was racial.

I felt that as I went through this — I don't think that Mr. Brady would like to go through this entire list of jurors — that we could find people, both white and black, not very much worth striking from my point of view. The panel was good, as I commented, with about three exceptions, which I struck.

MR. BRADY: Can we further agree that during Voir Dire selection, I asked a collective question as to whether there was any reason as a jury **[18]** group they could not approach this

with an open mind, follow the Court's instructions on the matters of law, and give both the State of Missouri and the defendant a fair trial and make no decision until the case was submitted to them under the Court's instructions and arguments, when they had the opportunity to discuss it with one another collectively and individually in their jury room?

MS. PRIEBE: I think what we are going into here is opposed to the very name of a preemptory challenge, if anything. If they could not follow the instructions, no, they could not be fair, they would be removed for cause, and people like that were removed for cause.

In the case of people who say, yes, I could be fair, I think I could, I will try to be fair, then it is a much more subjective decision, such as on the basis of clothing, looking away, or for whatever reason.

MR. BRADY: Is there any one of the jurors whom you have described as not being fully communicative and responsive to what you wanted to know where you requested assistance of the Court to obtain a fuller answer or response?

MS. PRIEBE: No. I didn't feel any need **[19]** for that. I feel that the juror's cooperation or lack thereof is indicative of what type juror they will be.

I didn't feel I needed assistance with my decision, nor did I ask the Court to strike them for cause, nor did I believe they should have been removed for cause. I do not feel that I have to justify any strikes that I made in that manner.

MR. BRADY: That's my record on this matter.

THE COURT: Let the Court make this observation, Counselors.

I think, as I understand the law, it is true that people should not be striken solely upon the basis of religion, race, color, or

creed. That should not be the sole basis for preemptory challenges, although it has traditionally been the practice of attorneys striking preemptorily any person that they, the attorneys, deem inappropriate to them or to their pursuit of success for their clients.

Now, it just seems to the Court that it would be a very inimical situation unless glaringly so to interfere with the trial strategy of counsel in selecting the jury.

Now, if it becomes patently obvious that strikes are made solely on the basis of religion, **[20]** color, creed, birth, or what-have-you, then I think that is something that is objectional and inimical to our way of life and our system of justice.

I tried a case or two when I was practicing law, where you just get a gut reaction and a feeling, and maybe it isn't substantiated by fact, that this juror just doesn't care for me. Whether it is a reasonable or unreasonable conclusion is really beside the fact. The point of the matter is you feel that a juror won't look with favor upon your cause of action and representation of your client or that for some reason or another you are objectionable to that juror.

Absent a glaring pronouncement of something that is absolutely unconscionable, I think that must be reposed in the discretion of the trial counsel, because so much depends upon the selection of a jury. As a matter of fact, it is the most important facet of the whole trial as we know it.

It has been brought to the Court's attention that at one time the State of Missouri was thinking of having the Circuit Judges take over the Voir Dire examination because the attorneys were indoctrinating and rehabiliating or what-have-you the prospective jurors to that particular individual **[21]** questioning lawyer's point of view. They were really doing a soft soap number right then and there in the Voir Dire.

So I just want to make that statement, because I have been on the bench a little while and I have tried cases, and it is very difficult to define for what reason a preemptory challange is made, whether because of race or color or creed or origin of birth.

So I am going to overrule the objection.

I don't see anything abhorrent or nefarious in the exclusion of certain people. It just seems to me that that is the very prerogative of the trial lawyer. So the objection is overruled.

MR. BRADY: Let me ask the Court to make a ruling on this: Is there any indication that during the Voir Dire examination — I think mine was reasonable, not is excess of ten minutes — did I do any rehabilitation of anyone for any purpose that was improper?

THE COURT: No, absolutely not.

What I am saying is that in the many cases that I have tried — and I would be shocked if any experienced Circuit Judge would say that it has never occurred in his Division, that an attorney in Voir **[22]** Dire has tried to rehabilitate the jury as best they can to show their personalities and character to prospective jurors.

I don't find that so in this case, but I am just saying when we get into this area of telling the attorney who he or she cannot strike, then we are depriving the attorney in my judgment of the discretion to try the case as he or she sees fit. That's why I made the statements I made.

I think it would be a bad precedent, and that is just my feeling on that.

(Whereupon the following proceedings were had in open Court.)

THE COURT: Thank you Mr. Bailiff.

Counselors of the Bar, are the individual citizens who are sitting in the jury box the jury that has been selected by the attorneys to be the fact finders in this case?

MS. PRIEBE: Yes, Your Honor.

MR. BRADY: They are, Your Honor.

THE COURT: Thank you.

(The Court dismisses the jury panel to return to the central jury room.)

THE COURT: Ladies and gentlemen of the jury panel, you have been selected by the attorneys **[23]** to be the jury in this case, but you will not be sworn as the jury in this case for the reason that at this time we are also going to be recessing for the day.

During this recess and every other recess or adjournment of the Court, the Court is under the duty to give to you an admonition, and I must repeat this throughout the trial of the case. This is in accordance with the Rules of the Missouri Supreme Court. My requirement is to repeat this admonition or instruction at each and every recess, emphasizing and reflecting on the importance of its complete and absolute observation, and it reads as follows:

The Court again reminds you of what you were told at the first recess of Court, and until you retire to consider your verdict, you must not discuss this case among yourselves or with others or permit anyone to discuss it in your hearing.

You are not to form an opinion or express an opinion about the case until it is finally given to you to decide.

Now bearing that admonition in mind, we will be in recess until 9:15 tomorrow morning.

When you come back to Court at or before 9:15 a.m., come directly to the jury room for **[24]** Division Number 12 here on the seventh floor of the Civil Court Building.

Please do not return to the Central Jury Room on the eighth floor. That's the large room where all the jurors congregated

this morning. Your returning there will merely necessitate our sending up there and having you brought down to this Division.

All of you are now assigned to the Criminal Division Number 12. You will remain so assigned until released by the Court.

When you enter the jury room or you enter the Court building tomorrow morning at 9:15 a.m., come directly to the jury room for Division Number 12. You should not stand, sit, or loiter about the halls, the corridors, or the Courtroom.

Mr. Bailiff, will you show the jury where the jury room is for Division 12.

So until tomorrow morning at 9:15 a.m., the Court is in recess.

Good evening to you, ladies and gentlemen.

(Court is in recess for the day.)

* * * * * *

APPENDIX D

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION THREE

No. 52885

Appeal from the Circuit Court of the City of St. Louis

Hon. Michael F. Godfrey, Judge

State of Missouri,
Plaintiff-Respondent,

vs.

Russell Vincent,
Defendant-Appellant.

OPINION FILED: June 21, 1988

Defendant appeals from his conviction by a jury of illegal possession of a controlled substance, cocaine, and his sentence by the court as a persistent offender to fifteen years imprisonment. We affirm.

Defendant raises two issues on appeal. We deal first with his contention the evidence was insufficient to support the conviction. Defendant was observed by two police officers as he was standing on a sidewalk next to his car. During a fifteen minute period three persons approached him, handed him what appeared to be currency which he put into his left pocket. In each case defendant then reached into his right pocket and handed the person a small shiny package. The police officers approached defendant, placed him under arrest and retrieved from his right pocket a tinfoil packet containing a white powder. They also seized $130.00 in currency from his left pocket. The powder was chemically analyzed as cocaine.

Defendant contends the evidence did not establish his knowledge of the nature of the substance. That knowledge can be inferred from his exclusive possession of the packet and powder. *State v. Brown,* 683 S.W.2d 301 (Mo. App. 1984) [2]. It further could be inferred from his conduct while under surveillance which indicated that he was selling similar packets. The evidence was sufficient to support the conviction.

Defendant's remaining point is a challenge to the jury on the basis that the prosecutor utilized her peremptory challenges in a racially discriminatory manner contrary to *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The defendant was black. The prosecution utilized all of its peremptory challenges to remove six black veniremen and one alternate venireman. The jury as finally constituted contained seven whites and five blacks. In *State v. Crump,* 747 S.W.2d 193 (Mo. App. Jan. 12, 1988), we were confronted with a similar situation and an equally constituted jury. We held there that defendant failed to make a prima facie case under *Batson* because the eventual composition of the jury prevented the defendant from complaining that he was denied equal protection of the law. Some amplification of the reasons underlying *Crump* may be justified.

Batson was decided under the equal protection clause of the Fourteenth Amendment, not under the Sixth Amendment guarantee of "an impartial jury." What *Batson* did not identify was whose "equal protection" it was intended to guarantee. Two possibilities exist.

First, it is possible to read *Batson* as being directed solely to the defendant's right to equal protection. *Batson* itself, and *Swain v. Alabama,* 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965) whose principal holding *Batson* overturned (*See* White, J. concurring 106 S.Ct. 1725) were both cases in which a black was tried by an all-white jury created by the use of prosecution peremptory challenges to strike all blacks. The all-white com-

position of the juries in *Batson* and *Swain* is not without significance in determining the evil being addressed in *Batson*. Further the court relies upon *Strauder v. West Virginia,* 10 Otto 303, 100 U.S. 303, 25 L.Ed. 664 (1880) which held that "the State denies *a black defendant* equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposely excluded." (Emphasis supplied). *Batson,* 106 S.Ct. at 1716. At page 1717 of *Batson* the Court states "Purposeful racial discrimination in selection of the venire violates a *defendant's* right to equal protection because it denies *him* the protection that a trial by jury is intended to secure." (Emphasis supplied).

Second, it is possible to read *Batson* as protecting the rights of minority members of the venire, of the community as a whole, and to protect the judicial system itself. The Court in *Batson* stated:

> "Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial ... . A person's race simply 'is unrelated to his fitness as a jury.' ... As long ago as *Strauder,* therefore, the court recognized that by denying a person's participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror ... .
>
> "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice ... . Discrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to [black

citizens] that equal justice which the law aims to secure to all others.' " (106 S.Ct. at 1718).

In many cases in which a *Batson* challenge is raised the determination of which of these two possibilities was the overriding concern of the court is probably academic. But in the case before us, and in *Crump,* it is not. Defendant makes no showing of specific prejudice to him arising from the jury by which he was tried. It stretches the concept of prejudice to the defendant beyond all reasonable limits to conclude that a different result would ensue, where unanimity by the jury is required, if defendant had been allowed six or more black jurors instead of five. Such a proposition ultimately relies on the idea that if enough black jurors are seated at least one will refuse to convict the defendant because of their shared race, a concept clearly at war with the language and spirit of *Batson.* It becomes necessary, therefore, in a case such as this, to determine which of the two possibilities was the motivating force in *Batson.* If the purpose is to protect the defendant's rights, then it is difficult to perceive prejudice or a denial of his rights to equal protection when the jury contains a substantial representation of his race. If the purpose is to allow defendant to serve as a protector of the rights of others, then arguably he can assert these rights if any member of the venire has been the victim of discriminatory strikes.

The purpose of a criminal trial is to determine the guilt or innocence of the defendant. It has not generally been the policy or concept of the law to place the defendant into the role of a "vicarious avenger" protecting the rights of others than himself. The area in which that role comes closest to existence is in the exclusionary rule of the search and seizure cases. In *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) the Court stated that the exclusionary rule is the "only effectively available way" to compel respect for the constitutional guarantee against unreasonable searches and seizures. 81 S.Ct. at 1692. But in *Alderman v. United States,* 394 U.S. 164, 89

S.Ct. 961, 22 L.Ed.2d 176 (1969) and *Rakas v. Illinois,* 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) the Supreme Court refused to allow a defendant to challenge an unlawful search and seizure of another even when that search produced evidence damaging to the defendant. It is true that the search and seizure protections of the Fourth Amendment are private rights and equal protection has a more public nature.

In *Peters v. Kiff,* 407 U.S. 493, 92 S.Ct., 2163, 32 L.Ed.2d 83 (1972) the Court held a white defendant had standing to challenge an illegally constituted jury from which blacks had been systematically excluded in violation of 18 U.S.C. 243. The court reviewed cases arising under the equal protection clause and acknowledged that those cases had been brought under the single analytical umbrella of the *defendant's* right to equal protection. 92 S.Ct. 2167. It based its decision, however, on the proposition that an illegally constituted jury was a denial to the defendant himself of due process not that defendant was denied equal protection. The dissent noted that the majority opinion had refrained from relying on the equal protection clause. It further noted that the equal protection cases: "have been predicated from the beginning on the judicially noticeable fact 'that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy ... This presumption of prejudice derives from the fact that the defendant is a member of the excluded class... ." (Burger, C.J. dissenting, 92 S.Ct. 2171).

Unless, therefore, we are to conclude that *Batson* was intended to expand the previous concepts to create the defendant as the protector of rights other than his own, we must assume that a legitimate *Batson* challenge exists only if prejudce to defendant, actual or implied, resulting in a denial of his equal protection right has occurred.

This is buttressed by the first requirement of *Batson* for a *prima facie* case, that the defendant show that *he* is a member of a racial group capable of being singled out for differential treatment. *Batson,* 106 S.Ct. at 1722. If the purpose of *Batson* is to place into a defendant's hands the role of assuring that prosecutors do not act in a discriminatory fashion, his race should have no bearing on his functioning in that role. We recognize that the second part of that first test is that the "prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." That language might indicate that *Batson* applies if any discriminatory challenge is made regardless of its impact on defendant. It appears to us that the overriding purpose of *Batson* is to assure the defendant that he will not be tried by a non-representative jury from which his race has been purposefully and discriminatorily removed. This is not to say that a *Batson* challenge cannot be invoked if there is a member of defendant's race on the jury for we do not conceive *Batson* to be a justification for tokenism. Nor do we preclude the possibility that a defendant with a jury reasonably approximating the racial composition of the venire may not be able to establish, nevertheless, that the prosecution strikes prejudiced him. In this case neither tokenism nor prejudice has been claimed or shown. Under these facts we are unable to find that defendant has standing to raise a *Batson* challenge.

The judgment is affirmed.

/s/ Gerald M. Smith, Judge

Karohl, P.J.; Kelly, Jr., J.; Concur

APPENDIX E

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

No. 52885

State of Mo.,
Respondent,

vs.

Russell Vincent,
Appellant.

August 3, 1988

Appellant's motion for rehearing and/or transfer the Supreme Court is Denied.

FOR THE COURT BY /s/ James A. Puellawski
Chief Judge
Missouri Court of Appeals
Eastern District

APPENDIX F

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

MANDATE

No. 52885

Appeal from the Circuit Court of the City of St. Louis,
No. 851-01725, Division 12

State of Missouri,
Plaintiff-Respondent,

vs.

Russell Vincent,
Defendant-Appellant.

The Court, being sufficiently advised of and having considered the premises, adjudges that the judgment rendered by the Circuit Court of the City of St. Louis in its cause No. 851-01725 be affirmed, and that respondent recover of said appellant its costs and charges herein expended and have execution therefor in accordance with the opinion of this Court herein delivered June 21, 1988. It is further adjudged by the Court herein delivered June 21, 1988. It is further adjudged by the Court that the sentence pronounced against Russell Vincent be executed, and that Russell Vincent, having been found to be a prior and persistent offender, be committed to the Department of Corrections and Human Resources, State of Missouri, for confinement in the appropriate penal institution for a period of fifteen (15) years for Illegal Possession Of Schedule II Controlled Substance - Cocaine, and that the State of Missouri recover the sum of thirty-six ($36.00) dollars from Russell Vincent, the same being the sentence passed by the Circuit Court of the City of St. Louis.

APPENDIX G

IN THE SUPREME COURT OF MISSOURI

ED 52885

September Session 1988

State of Missouri,
Plaintiff-Respondent,
vs. TRANSFER
Russell Vincent,
Defendant-Appellant.

Now at this day, on consideration of Defendant-Appellant's Application to transfer the above entitled cause from the Eastern District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1988, and on the 13th day of September 1988, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 13th day of September, 1988.

/s/ Thomas F. Simon, Clerk.

/s/ Kathleen Blanton, D.C.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL
CLERK

No. 88-797

In the Supreme Court of the United States

OCTOBER TERM, 1988

RUSSELL VINCENT,
Petitioner,
vs.
STATE OF MISSOURI,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. WHETHER A TRIAL COURT MUST *SUA SPONTE*, MAKE INQUIRY OF THE PROSECUTING ATTORNEY TO EXPLORE THE POSSIBILITY OF PURPOSEFUL DISCRIMINATION IN THE USE OF PEREMPTORY CHALLENGES TO REMOVE VENIRE MEMBERS OF THE CRIMINAL DEFENDANT'S OWN RACE AFTER THE STATE SETS FORTH EXPLANATIONS FOR ITS STRIKES.
2. WHETHER THE MISSOURI COURT OF APPEALS ERRED IN DETERMINING THAT THE PETITIONER DID NOT HAVE STANDING TO CLAIM A VIOLATION OF HIS RIGHT TO EQUAL PROTECTION OF THE LAW CONCERNING THE STATE'S USE OF PEREMPTORY CHALLENGES UNDER CIRCUMSTANCES WHERE FIVE MEMBERS OF PETITIONER'S OWN RACE REMAINED TO SIT ON THE FINAL JURY PANEL.

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No. 88-797

In the Supreme Court of the United States

OCTOBER TERM, 1988

RUSSELL VINCENT,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION

OPINION BELOW

The opinion of the Missouri Court of Appeals affirming petitioner's conviction of possession of a controlled substance has been reported as *State v. Vincent*, 755 S.W.2d 400 (Mo.App., E.D. 1988).

STATEMENT OF THE CASE

Petitioner, Russell Vincent, was convicted of possession of a controlled substance in violation of § 195.020 RSMo. 1986. The facts related to this offense are summarized in the opinion of the Missouri Court of Appeals, Eastern District, *State v. Vincent*, 755 S.W.2d 400 (Mo. App., E.D. 1988) (Petitioner's Appendix D), and will not be restated here.

Additional facts relevant to petitioner's claims will be stated in respondent's Argument *infra*. Except as otherwise noted, respondent does not dispute that petitioner's contentions were raised before the Supreme Court of Missouri.

ARGUMENT

I. No Affirmative Fact Finding Inquiry on the Part of the Trial Court Is Required.

A. Neither the Decision Below nor the Factual Record Raises the Question Presented in the Petition.

Petitioner claims for the first time that the trial court failed to *sua sponte* question the Assistant Circuit Attorney concerning the use of her peremptory challenges to strike black venirepersons. Following the disclosure of the State's strikes, petitioner's counsel objected and called for the Assistant Circuit Attorney to explain the reasons for her strikes. The State voluntarily complied and petitioner's counsel made an extensive record by providing follow-up questions to each of the juror-by-juror responses. The trial court then overruled the objection. No exception was taken to the trial court's ruling on the objection without a further evidentiary hearing or inquiry by the trial court. Similarly, the issue was not considered by the Missouri Court of Appeals.

Thus missing from this case is the essential factual predicate of the Question Presented. This Court has "consistently refused to decide federal constitutional questions raised here for the first time on review of State court decisions". *Illinois v. Gates*, 459 U.S. 1028, 1029 n.2, 103 S.Ct. 436, 437 n.2, 74 L.Ed.2d 595 (1982). It follows that any action taken would constitute an impermissible advisory opinion. For this reason alone, this failure to present the question to any court below calls for denial of the petition.

B. The Hearing Conducted Met and Exceeded the Factual Inquiry Requirements of Batson v. Kentucky.

In *Batson v. Kentucky*, 476 U.S. ....., 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), this Court determined that the criminal defendant must establish a prima facie case of purposeful discrimination on the part of the prosecution. Upon making that showing, the burden passes to the prosecution to come up with a neutral explanation for the use of its peremptory challenge. From there, the trial court "will have the duty to determine if the defendant has established purposeful discrimination." *Id.* 106 S.Ct. at 1724. This Court expressly declined to "formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." *Id.*

It is clear from *Batson*, that no specific mechanism is required when the trial court carries out its duty to determine if the defendant has established purposeful discrimination. In the present case, petitioner's trial counsel carefully examined the Assistant Circuit Attorney's responses to support each of her six strikes. No indication was made to the trial court that this method of ascertaining the State's motive was in any way constitutionally deficient. It must be assumed that petitioner and the trial court were satisfied with the procedure undertaken to reach its conclusion that no discriminatory motive was shown. As petitioner has failed to plead facts indicating what additional questioning should have taken place or what additional evidence would have been adduced, it is wholly inappropriate at this final stage of review, to suggest that further inquiry should have been made.

II. A Showing of Prejudice Is Required Under Batson.

Petitioner next challenges the Court of Appeals' conclusion that he had no standing to bring a *Batson* challenge. The State utilized its peremptory challenges to strike six blacks but nonetheless the venire panel was made up of enough blacks that petitioner was tried before a jury consisting of five blacks and seven whites. As the evidence against petitioner was overwhelming and there was no racially sensitive issues present, the Court's ruling that no prejudice was alleged or shown is amply supported by the record and well within the confines of *Batson* and previous decisions of this Court.

In the opinion below, the Court of Appeals determined that petitioner had no standing to bring the *Batson* challenge as he had made no showing of prejudice as a result of the jury selection procedures. The Court noted the uncontroverted evidence against petitioner stating that "it stretches the concept of prejudice to the defendant beyond all reasonable limits to conclude that a different result would ensue, where unanimity by the jury is required, if the defendant had been allowed six or more black jurors instead of five." This conclusion is amply supported by the factual record as evidence established that three persons approached petitioner while he was standing on a sidewalk, handed him currency, and in return, petitioner handed each person a small, shiny package. Later, the officers arrested petitioner and seized a tin-foil packet containing cocaine and one hundred and thirty dollars in currency. Petitioner's defense consisted of unfounded argument that the State did not establish that petitioner had knowledge of the nature of the substance *found in his pocket*. As such,

the jury was given absolutely no basis to acquit petitioner.

The Court interpreted *Batson* as potentially protecting the equal protection rights of both the criminal defendant and the individual jurors allegedly stricken on account of their shared race. The Court concluded that *Batson* was not intended to make the defendant a vicarious guardian of rights other than his own, but was limited in application to situations where actual or implied prejudice has occurred in the defendant's criminal trial. The Court reasoned that the "overriding purpose of *Batson* is to assure the defendant that he will not be tried by a non-representative jury from which his race has been purposefully and discriminatorily removed."

Although the opinion below does not limit *Batson* to its facts, *Batson* presented an entirely different factual scenario. In *Batson*, this Court considered the most extreme situation in which all blacks were stricken so that the defendant was tried before an all white jury. This Court expressly stated the purpose of its decision was to determine on a case by case basis if permissibly neutral selection criteria produced the "monochromatic result." Quoting *Alexander v. Louisiana*, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972). This language suggests that the absence of a monochromatic result eliminates the need to make a *Batson* inquiry. Further, it indicates a need to evaluate the final composition of the jury in consideration of the equal protection claim.

Under the Missouri approach, one peremptory challenge could theoretically be utilized by the State to strike a black juror, but the defendant could nonetheless be

tried by a jury consisting of twelve blacks. See *State v. Crump*, 747 S.W.2d 193 (Mo.App., E.D. 1988). It is inconceivable to suggest that even assuming an equal protection violation as to that one strike, that a new trial would be required. To impose an absolute new trial requirement would be akin to the exclusionary rule for illegally seized evidence. See *Mapp v. Ohio*, 367 U.S. 463, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Such a requirement would not serve to ensure the plaintiff a fair trial, but would merely deter future violations from taking place. In no way does *Batson* indicate that such a rigid and far reaching penalty must be imposed for an equal protection violation. Further, it has been sufficiently impressed upon the prosecutors of this State that the use of peremptory challenges to strike minority members of the jury will not be tolerated. *State v. Payton*, 747 S.W.2d 290 (Mo.App., E.D. 1988); *State v. Blackmun*, 744 S.W.2d 482 (Mo.App., S.D. 1988); *State v. Tolliver*, 750 S.W.2d 624 (Mo.App., S.D. 1988); *State v. Butler*, 731 S.W.2d 265 (Mo.App., W.D. 1987); *State v. Reliford*, 753 S.W.2d 9 (Mo.App., W.D. 1988). It would serve no purpose to order a new trial on the facts of this case where the State's evidence was uncontradicted, no racially sensitive issues were present, and there is absolutely no indication that the jury was anything other than impartial.

The Court of Appeals' review for prejudice in the present case constitutes, in essence, application of the harmless error rule. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). This type of judicial review "promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Delaware v. Van Arsdale*, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436-37, 89 L.Ed.2d 674 (1986).

Application of this type of review has been limited by this Court only to circumstances where the alleged constitutional violations create "so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless." *Satterwhite v. Texas*, ... U.S. ....., 108 S.Ct. 1792, 1797, 100 L.Ed.2d 284 (1988).

This is not a situation where the supposed constitutional error permeated the entire judicial proceeding. To suggest otherwise is to foster the discriminatory attitude sought to be eliminated from criminal proceedings in *Batson*. Given the premise that the error was in fact harmless, a new trial in such situations would be ordered solely to allow petitioner an opportunity to solicit one black juror who would acquit him solely on account of their shared race. This result must not be tolerated as it encourages " 'litigants to abuse the judicial process and bestirs the public to ridicule it.' " *Delaware v. Van Arsdale, supra,* 106 S.Ct. at 1437. Both sides in criminal prosecutions must be made to recognize that jurors are jurors regardless of race. As there is no conflicting case law which might indicate that the harmless error rule does not apply in *Batson* cases, the petition for a writ of certiorari must be denied.

CONCLUSION

In view of the foregoing, the respondent submits that the Petition for Writ of Certiorari must be denied.

Respectfully submitted,

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